FILE COPY

No. 213

In the Supreme Court of the United States

OCTOBER TERM, 1935

INDUSTRIAL TRUST COMPANY AND ORLANDO S. GREENE, EXECUTORS OF THE ESTATE OF WILLIAM M. GREENE, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

Burnet v. *Wells*, 289 U. S. 670, 679	8
Bushman v. *United States*, 8 F. Supp. 694, certiorari denied May 27, 1935, No. 871, October Term, 1934	9
Chase National Bank v. *United States*, 278 U. S. 327	6, 8
Commissioner v. *Schwarz*, 74 F. (2d) 712	7
Heiner v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082, certiorari denied, 286 U. S. 561	6, 8
Helvering v. *Duke*, 290 U. S. 591	7
Helvering v. *St. Louis Union Trust Co.*, pending on writ of certiorari, No. 25, present term	6
Hoblitzelle v. *United States*, 77 C. Cls. 639	7
Klein v. *United States*, 283 U. S. 231	7, 8
Levy's Estate v. *Commissioner*, 65 F. (2d) 412	6
Lewellyn v. *Frick*, 268 U. S. 238	6, 7
Porter v. *Commissioner*, 288 U. S. 436	6, 8, 9
Sargent v. *White*, 50 F. (2d) 410	7
Third National Bank v. *White*, 287 U. S. 577	9
Tyler v. *United States*, 281 U. S. 497	8, 9
Union Trust Co. v. *United States*, 73 C. Cls. 315, certiorari denied, 286 U. S. 547	9
United States v. *Bingham*, 76 F. (2d) 573, pending on petition for certiorari, No. 83, present term	6, 9
United States v. *Mitchell*, 271 U. S. 9	8
Wallace v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002, certiorari denied, 293 U. S. 600	7
Webster v. *Fall*, 266 U. S. 507	8

Statutes:

Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 (U. S. C., Title 26, Sec. 1094)	7
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 (U. S. C. App., Title 26, Sec. 1094)	2

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 213

INDUSTRIAL TRUST COMPANY AND ORLAND S. Greene, Executors of the Estate of William M. Greene, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 18–28) is reported in 9 F. Supp. 817.

JURISDICTION

The judgment of the court below was entered February 14, 1935 (R. 28). A motion for new trial was overruled April 8, 1935 (R. 29). The petition for a writ of certiorari was filed July 3,

1935 (R. 29). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of a life insurance policy, which was surrendered for its value in paid-up insurance in 1912, may be included in the insured's gross estate under Section 302 (g) of the Revenue Act of 1926, where the beneficiaries' interests became absolute only at the insured's death in 1930.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.
>
> * * * * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other

beneficiaries as insurance under policies taken out by the decedent upon his own life. * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act (U. S. C. App., Title 26, Sec. 1094).

STATEMENT

The findings of fact of the Court of Claims (R. 15–17) may be summarized as follows:

The petitioners are the executors of the estate of William M. Greene, who died on May 30, 1930 (R. 15). On May 29, 1931, the petitioners filed an estate-tax return disclosing a Federal tax of $24,168.27 (after allowance for a credit of $96,673.10 for State inheritance tax), which was paid on that date (R. 15).

A life-insurance policy taken out by the decedent on his own life in the Union Central Life Insurance Co., and payable to the decedent's children, was included in the gross estate in the return, less $40,000 thereof, which exemption was allowed by the Commissioner (R. 15).

A paid-up policy of $42,000, taken out by the decedent in the Equitable Life Assurance Society,

was not included in the gross estate in the return filed by the petitioners, but was included by the Commissioner in his final determination, and is the policy involved in this suit (R. 15).

On October 17, 1932, a closing agreement with respect to the tax liability of the estate was entered into by the petitioners and the Commissioner, with the approval of the Undersecretary of the Treasury, by which it was determined that the correct tax liability was $128,197.73, subject to a credit not to exceed 80% for State estate, inheritance, legacy, or succession taxes, and also subject to a reservation by the petitioners of the right to file a claim for refund in regard to the tax involved in the inclusion of the $42,000 Equitable Life Assurance Society policy in the gross estate (R. 15–16). On November 1, 1932, after taking the appropriate credits for State inheritance taxes, the petitioners paid the full amount of the balance of the tax in the sum of $1,471.28, with interest (R. 16).

The $42,000 policy was dated March 2, 1892, and contained the following provisions (R. 16–17):

> Does promise to pay to Jennie D. Greene, wife of William M. Greene, for her sole use, if living, in conformity with the statute, and, if not living, to the surviving children of said William M. Greene, or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said William M. Greene, at the office of the society in the city

> of New York, fifty thousand dollars, upon satisfactory proofs of the death of said William M. Greene, * * *.

At the end of the tontine period, namely, March 2, 1912, the policy gave the insured a choice of six methods of settlement (R. 17). On February 19, 1912, the decedent endorsed on the policy the following (R. 17):

> Surrendered as of Mch. 2, 1912, for its value in paid-up insurance.

The insurance company, by an appropriate official, endorsed the policy March 4, 1912, agreeing that the policy had become a paid-up policy of $42,000 (R. 17).

The decedent's wife died before him, but he was survived by his three children, to whom the proceeds of the policy were paid upon the death of the decedent (R. 17).

The tax paid by the estate because of the inclusion in the gross estate of the proceeds of the $42,000 policy was $756 (R. 17). For that amount the petitioners, on November 3, 1932, filed a claim for refund, stating as grounds thereof: (1) that the beneficiary was not the estate of the insured; (2) the decedent had no right to change the beneficiary; (3) the decedent had no right to borrow money on the policy; and (4) the decedent could not receive the cash-surrender value of the policy (R. 16). It was further contended in the claim that the fact that the policy was payable to the insured's estate in the event of his survival of the

beneficiaries did not make the policy taxable (R. 16). The claim for refund was rejected by the Commissioner August 23, 1933 (R. 16).

The court below dismissed the petition (R. 28).

ARGUMENT

The petitioners urge that Section 302 (g) of the Revenue Act of 1926, *supra*, p. 2, should not be construed to include the insurance policy involved here because it was issued and became a paid-up policy prior to the passage of a Federal estate tax. We submit, however, that subdivision (h), *supra*, p. 3, clearly makes the section applicable. Cf. *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412 (C. C. A. 2d) and see *Porter* v. *Commissioner*, 288 U. S. 436, 442; *Chase National Bank* v. *United States*, 278 U. S. 327, 334. *Lewellyn* v. *Frick*, 268 U. S. 238, was concerned with an earlier statute containing no specific direction with respect to its application to policies issued before its enactment. Furthermore, that case has not been interpreted as preventing a construction of such early statutes to include policies issued prior to the existence of estate taxes where, as here, it has been called to the court's attention that death resulted in an enlargement of property rights. *United States* v. *Bingham*, 76 F. (2d) 573 (C. C. A. 1st), pending on petition for certiorari, No. 83, present term; cf. *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), certiorari denied, 286 U. S. 561.

The question presented for decision in *Helvering* v. *St. Louis Union Trust Co.*, pending on writ of

certiorari, No. 25, present term, is whether the value of a decedent's remainder interest in a trust should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death" under Section 302 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 305 (U. S. C., Title 26, Sec. 1094). That case presents a question of statutory construction which stands in need of clarification (see *Commissioner* v. *Schwarz*, 74 F. (2d) 712 (C. C. A. 2d); *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600; *Helvering* v. *Duke*, 290 U. S. 591; cf. *Klein* v. *United States*, 283 U. S. 231), but the present case is not touched by the confusion those decisions have created. This case arises under another provision of the statute which in broad terms requires the inclusion in a decedent's gross estate of the proceeds of all life insurance policies.

The petitioners' constitutional attack upon the statute is directed chiefly at its application here to a policy issued and paid up prior to the passage of an estate tax.[1] There is no prohibited retroactive application of the statute simply because the policy was paid up as early as 1912. That point was not only specifically excluded from the decision in *Lewellyn* v. *Frick*, *supra* (see p. 251), but any ex-

[1] The validity of the statute as applied to policies issued after an estate tax was on the statute books is supported by the reasoning of this Court in *Klein* v. *United States*, *supra*, pp. 234–235; cf. *Hoblitzelle* v. *United States*, 77 C. Cls. 639; *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st).

pressions of doubt in that decision as to the constitutionality of such application have less than the usual authority of statements not required by the decision, because the effect of the rights retained by the insured in the policies involved in that case was neither raised nor considered. See *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d), certiorari denied, 286 U. S. 561. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14. Life insurance payable to others, but in which the insured has retained an interest, may be included in the insured's estate for purposes of Federal estate taxation. *Chase National Bank* v. *United States*, 278 U. S. 327.

The decedent retained a connection with the rights and interests ~~thereby~~ generated by the contract of insurance. *Burnet* v. *Wells*, 289 U. S. 670, 679. The interests of the beneficiaries in the policy became complete for the first time when the insured died in 1930. The tax was laid upon the happening of that event. The resulting enlargement or ripening of property rights in the beneficiaries and the valuable assurance given them that there could be no change in their rights, make that a proper event upon which to base the tax and make it reasonable to consider that the policy was taken out as a substitute for a testamentary disposition. See *Klein* v. *United States*, *supra*, p. 234; *Porter* v. *Commissioner*, 288 U. S. 436, 444; *Tyler* v. *United States*, 281 U. S. 497, 502–503. A tax thus grounded is not given a retroactive operation by the fact that an early transaction has made certain that the event

chosen by the statute will be accompanied by circumstances justifying the imposition of the tax. *Union Trust Co.* v. *United States*, 73 C. Cls. 315, certiorari denied, 286 U. S. 547; cf. *United States* v. *Bingham, supra.*

The petitioners' contention that the tax should not be measured by the face value of the policy is without merit. Decisions of this Court establish that a tax measured by the full value of property is justified, although the decedent's interest may be subject to outstanding rights (*Tyler* v. *United States, supra; Third National Bank* v. *White*, 287 U. S. 577; *Bushman* v. *United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied May 27, 1935, No. 871, October Term, 1934), or may even be unavailable for use to the decedent's benefit. *Porter* v. *Commissioner, supra.*

CONCLUSION

The decision below is correct, and not in conflict with any decision of a Circuit Court of Appeals or with any decision of this Court. The petition should therefore be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
J. R. FILLMAN,
Special Assistants to the Attorney General.

AUGUST 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935